

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PATRICK ALEXANDRÉ,)	
)	
Plaintiff)	
)	
v.)	Civil No. 03-132-B-W
)	
AL CICHON, et al.,)	
)	
Defendants)	

**RECOMMENDED DECISION ON MOTION FOR
SUMMARY JUDGMENT BY GLENN ROSS**

Patrick Alexandre is incarcerated at the Maine State Prison and is the plaintiff in this 42 U.S.C. § 1983 action seeking remedy for the allegedly inadequate medical attention he received when he was at the Penobscot County Jail. (Docket No. 1.) He alleges that the defendants, in contravention of the constitutional prohibition against cruel and unusual punishment, were deliberately indifferent to his need for appropriate treatment of a shoulder injury sustained when he slipped when exiting the shower at the jail. Currently pending are three motions for summary judgment on behalf of the three defendants, Penobscot County Sheriff Glenn Ross (Docket No. 32), and physician assistants Al Cichon (Docket No. 38) and Jonathan Coggeshall (Docket No. 36). In this decision I address Ross's motion (Docket No. 32)¹ and I recommend that the Court **GRANT** Ross's motion as he is entitled to summary judgment as a matter of law.

Discussion

While at the jail Alexandre was entitled to "the minimal civilized measure of life necessities." Wilson v. Seiter, 501 U.S. 294, 298 (1991) (quoting Rhodes v. Chapman,

¹ In separate decisions I address the motions of Cichon and Coggeshall.

452 U.S. 337, 347 (1981)). One such necessity is treatment of medical conditions and, accordingly, the denial of necessary medical care can rise to the level of a constitutional violation, see generally Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97 (1976).²

However, deliberate indifference liability attaches only when a state actor "knows of and disregards an excessive risk to inmate health or safety." Farmer, 511 U.S. 837. The state actor "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837. In other words, a plaintiff with such a claim must not only demonstrate inadequate care, he or she must demonstrate the defendant(s) who deprived the inmate of care did so with a culpable state of mind. Id. at 834.

Related to this state-of-mind requirement are the tenets that inmates do not have a right to limitless doctor visits or their choice of medications, and negligence and medical malpractice are not actionable in a 42 U.S.C. 1983 suit. Daniels v. Williams, 474 U.S. 327 (1986) (noting that 42 U.S.C. § 1983 provides a right of action for civil rights violations and cannot be used to sue correctional officials for negligence). "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical

² In terms of the applicable Constitution standard, there is a twist in this case, in that Alexandré was both a convicted prisoner and a pre-trial detainee while at the jail. However, the First Circuit stated in Burrell v. Hampshire County that: "Pretrial detainees are protected under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment; however, the standard to be applied is the same as that used in Eighth Amendment cases." 307 F.3d 1, 7 (1st Cir. 2002) (citing Bell v. Wolfish, 441 U.S. 520, 545(1979) (the Due Process Clause protections are at least as great as those under the Eighth Amendment); 1 M.B. Mushlin, Rights of Prisoners § 2.02 (2d ed. Supp.2001)"); accord Calderon-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002); Elliott v. Cheshire County, 940 F.2d 7, 10 (1st Cir. 1991); Gaudreault v. Municipality of Salem, 923 F.2d 203, 208 (1st Cir.1990); McNally v. Prison Health Servs., Inc., 28 F.Supp.2d 671, 673 (D. Me.1998).

malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle, 429 U.S. at 106.

Ross is entitled to summary judgment on Alexandré's Eighth Amendment claim only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [Ross] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," id. I view the record in the light most favorable to Alexandré and I indulge all reasonable inferences in his favor. See Savard v. Rhode Island, 338 F.3d 23, 25 -26 (1st Cir. 2003). However, to the extent that Alexandré has failed to place Ross's facts in dispute, I deem the properly supported facts as admitted, see Faas v. Washington County, 260 F. Supp. 2d 198, 201 (D. Me. 2003).³

Ross's Material Facts

In May of 2002, Patrick Alexandré was transferred from a federal facility, where he had been serving a sentence, to the Penobscot County Jail to await trial. (Ross SMF ¶ 1.) In March of 2003, Alexandré claims that he slipped and fell at the jail, injuring his right shoulder. (Id. ¶ 2.) The jail's medical records reflect that Alexandré filled out an inmate medical request on March 27, 2003, indicating that his shoulder hurt very bad, and, additionally, that he needed to see a psychiatrist. (Id. ¶ 3.)

³ Alexandré's pro se status does not relieve him of his duty to respond, see Parkinson v. Goord, 116 F.Supp.2d 390, 393 (W.D.N.Y 2000) ("[P]roceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment"), nor does it mitigate this Court's obligation to fairly apply the rules governing summary judgment proceedings, see Fed. R. Civ. P. 56; Dist. Me. Loc. R. Civ. P. 56.

Alexandré was examined by medical staff on March 28, 2003, at which time Alexandré identified that he had suffered a right shoulder contusion two weeks prior to that date. Alexandré was examined by Physician's Assistance Jonathan Coggeshall, who diagnosed right shoulder tendinitis. (Id. ¶ 4.) Coggeshall's treatment plan at that time was for Alexandré to rest and protect his right arm. (Id. ¶ 5.) On April 9, 2003, Alexandré submitted another medical request indicating that he had pain in his right shoulder. Jonathan Coggeshall noted on the inmate request a diagnosis of right shoulder tendinitis and reiterated that Alexandré should rest his right shoulder. (Id. ¶ 6.) On April 14, 2003, Alexandré submitted another medical request indicating his right shoulder was killing him, and was essentially keeping him awake and causing him pain. Coggeshall again responded to the request, changing the impression of the right shoulder injury to right shoulder synovitis. (Id. ¶ 7.)

On April 29, 2003, Alexandré submitted another medical request complaining of pain in the right shoulder and stating that it was getting worse. In response to this request, Alexandré was examined on May 2, 2003, and it was noted that he had right shoulder pain for two months and that he had a history of many injuries to his shoulder. The examination revealed less range of motion in the right shoulder, but no crepitus. In response to this examination, Alexandré was to be scheduled for x-ray of the right shoulder. (Id. ¶ 8.).

On May 5, 2003, Mobile Medical Services x-rayed Alexandré's right shoulder. The reading radiologist's impressions from the x-rays were: no acute fracture or dislocation, chronic deformity and hypertrophic changes at the distal clavicle which,

based upon the degree of deformity, suggested old, healed distal clavicle fracture, and that the right shoulder is otherwise negative. (Id. ¶ 9.)

On May 11, 2003, Alexandre submitted another inmate medical request indicating that his right shoulder was killing him and that he wanted an MRI or CT scan done on his shoulder. (Id. ¶ 10.) On May 12, 2003, the nursing progress notes indicate that Alexandre was complaining of pain in his right shoulder, indicating that it seemed to be getting worse. (Id. ¶ 11.) On May 15, 2003, Alexandre filled out another medical request stating that he wanted to talk to a doctor at Eastern Maine Medical Center (EMMC) and complaining about his right shoulder pain. (Id. ¶ 12.) On May 16, 2003, Alexandre was examined by Coggeshall. On this date, Alexandre identified that he fell on March 10, 2003, in the shower, and that that was when the pain in his right shoulder began. The record notes that Alexandre had been prescribed Ibuprofen, which he had not been taking, and that the x-rays identified only chronic degenerative changes in the shoulder. (Id. ¶ 13.)

Coggeshall's medical record dated May 16, 2003, also notes that Alexandre had a history as a woodcutter, that he had many injuries to his right shoulder in the past, and that Alexandre was quite insistent during the examination that he needed to go to the hospital, have an MRI, and, likely, surgery. (Id. ¶ 14.) Coggeshall's May 16, 2003, medical record identifies that it was his opinion from the description of the fall and the examination in March that the mechanism was not great enough to have produced a new rotator cuff tear. In Coggeshall's mind, the question was one of identifying the nature of the structural problem and ascertaining whether the injury was new or old. It was Coggeshall's opinion that the fall did not create a rotator cuff tear at that time, and that,

due to the long history of accidents to the right shoulder, Coggeshall would recommend a conservative course of physical therapy at that time. (Id. ¶ 15.)

On May 18, 2003, Alexandre filled out an inmate request form indicating that he had a medical emergency and that he needed to be taken to the hospital to have his right shoulder treated. On the same date, Alexandre filled out a medical request form indicating that he was in very serious pain and that he needed to be sent to the hospital. The nursing progress note from this date indicates that Coggeshall was contacted in response to Alexandre's two requests dated May 18, 2003, and Coggeshall recommended that Alexandre be placed on a new medication, Hydrocodone. (Id. ¶ 16.)

On May 23, 2003, Alexandre was again examined by Jonathan Coggeshall. At that time, Coggeshall discussed treatment options with Alexandre. Alexandre indicated he would like an immediate referral to an orthopedist and possible surgery. Coggeshall explained to Alexandre that his security risk was fairly great and it would be somewhat difficult getting him to the outside for any of these visits. Coggeshall, however, did refer Alexandre to the Orthopedic Clinic at the EMMC. (Id. ¶ 17.)

Alexandre was seen at EMMC by Rajendra Tripathi, M.D., on June 2, 2003. On physical examination, the doctor found some tenderness in the right shoulder and significant point tenderness in the area of the greater tuberosity of the right humerus as well as along the long head of the biceps. The doctor's evaluation was that Alexandre had tendinitis of the long head of the biceps tendon as well as bursitis of the shoulder and he would benefit from a depo-medrol injection. Alexandre was given depo-medrol and zylocane in the area of the rotator cuff and the greater tuberosity bursa. (Id. ¶ 18.) In that Alexandre did not have any relief from the injection, the examining doctor recommended

an MRI scan, which was discussed with Coggeshall, and the doctor noted that the patient would be scheduled for the MRI study. (Id. ¶ 19.)

On June 2, 2003, Alexandre was taken for an MRI in response to Tripathi's referral. The MRI revealed a small partial thickness tear to the posterior fibers of the supraspinatus tendon, degenerative atrophy to the acromioclavicular joint, inflammation in the region of the coracoclavicular ligament, and a small intrasubstance tear in the medial portion of the deltoid muscle. (Id. ¶ 20.) Tripathi issued a prescription for Alexandre for the pain killer Percocet. The jail's medical records indicate, at the bottom of the inmate transportation request, that Alexandre was to be given the Percocet and be evaluated by a physician's assistant on June 6, 2003. (Id. ¶ 21.)

Alexandre's progress notes indicate that on June 7, 2003, he was seen by the medical department requesting a continuation of his Percocet. Alexandre informed them that the medication was helping and medical staff noted that the Percocet had been ordered for four days, ending on June 6, 2003. (Id. ¶ 22.) The jail's medical records reflect that Alexandre was seen by Coggeshall on June 6, 2003, and that no new orders were given with respect to the Percocet, except to follow-up in one week. The nurse consulting with Alexandre on June 7, 2003, contacted Al Cichon, another physician's assistant under contract with the jail, who indicated that Alexandre should not be given additional Percocet. (Id. ¶ 23.)

On June 9, 2003, Coggeshall advised the nursing staff at the Penobscot County Jail to give Alexandre Percocet, and further indicated that Alexandre's follow-up appointment with the orthopedic doctor for that date should be canceled. (Id. ¶ 24.) In

regard to the cancellation, the jail's medical file indicates that the orthopedic doctor, Patricia Griffith, M.D., sent Coggeshall a letter dated June 9, 2003:

Thank you for speaking to me about Patrick Alexandré. He had been referred to my care by Dr. Tripathy (sic) for a rotator cuff tear as well as acromioclavicular degenerative joint disease. Per our conversation, I feel his medical care can be deferred until his social situation is clarified in one month. My understanding of his history is that he has had multiple prior injuries to his shoulder, neck and head. He sustained shoulder pain after falling in March while in custody. He had an MRI which did show chronic arthritic changes as well as a small rotator cuff tear. My understanding from speaking with you is that he is to be tried within a month. At that time he will either be released or transferred to a different facility. I believe his care would be best facilitated by having him seen by myself after release or seen by the physician at the accepting facility after his trial.

(Id. ¶ 25.) The jail's medical records reflect that Alexandré was seen by Coggeshall on June 13, 2003. The note indicates that Alexandré was to continue on Percocet for the pain in his shoulder. (Id. ¶ 26.)

The next medical request filled out by Alexandré was on July 2, 2003, at which time he indicated he had a skin problem. In response to this identified medical problem, Alexandré was seen by Cichon who diagnosed seborrheic dermatitis. Cichon also observed that Alexandré was wearing a sling and this was discussed. Cichon noted that Alexandré had been diagnosed with a small rotator cuff tear and that Alexandré was wearing a sling all the time. Cichon asked Alexandré about what exercises he was doing, and Alexandré indicated he was doing "great circles" but had stopped those because they caused discomfort. Alexandré reported no other exercises. Cichon recommended Alexandré begin doing great circles again and that Alexandré do wall crawls in order to avoid a stiff or frozen shoulder. Cichon noted that Alexandré did not display significant

understanding of his current circumstances and also seemed somewhat subdued and sedated, raising a question about his possible over-medication. (Id. ¶ 27.)

On July 14, 2003, Alexandre filled out a medical request asking for copies of his medical records under the Freedom of Information Act. (Id. ¶ 28.) On July 16, 2003, Alexandre submitted a medical request asking for an appointment at the hospital to get his shoulder fixed, claiming that he was in a lot of pain. In response to this request, he was evaluated by Cichon. Cichon reviewed Alexandre's medical records and identified that the orthopedist stated that treatment could wait until Alexandre was transferred to a prison facility or released. This was shown to Alexandre, who focused on the fact that the orthopedist was looking at a one-month time frame. Cichon explained to Alexandre that the fact that Alexandre would be there for some length of time was not a new consideration but that his case would be reviewed. (Id. ¶ 29.) In addition to the medical record, Cichon prepared a memorandum after meeting with Alexandre that indicated that Alexandre was frustrated that he had not had surgery yet and that Alexandre had little tolerance for anything other than an affirmative response. Cichon further indicates that he allowed Alexandre to read the letter sent by the orthopedist and that Alexandre became focused on the one-month mentioned in the letter. Cichon told Alexandre that the surgeon felt that the surgery was not immediately necessary and that, should his circumstances change, adjustment to the decision may need to be based upon length of stay, severity of the condition, and/or other factors. (Id. ¶ 30.)

On July 22, 2003, Alexandre filled out another request indicating that his shoulder was very painful, stating that he had no use of his right arm, and begging the medical department to make him an appointment at the hospital. (Id. ¶ 31.) Alexandre was seen

by Cichon on July 25, 2003. Cichon's medical record reflects that Alexandre presented with continuing shoulder discomfort. Examination revealed continued tenderness in the deltoid and in what appears to be the long head of the biceps. Cichon's treatment plan was to begin Alexandre on a series of improved exercises to increase his range of motion. He recommended that Alexandre continue his current course of treatments and noted that the jail would consider referral to physical therapy for assessment. (Id. ¶ 32.)

Cichon referred Alexandre to HealthSouth for physical therapy, and on August 7, 2003, HealthSouth conducted a patient evaluation of Alexandre and provided him with five exercises to be performed in his cell and also indicated they would schedule him for an appointment in one week. (Id. ¶ 33.) On August 15, 2003, Alexandre was taken to physical therapy, and provided with a series of exercises to be conducted with a rubber band. On August 22, 2003, Alexandre was again taken to physical therapy with HealthSouth and the physical therapist identified that Alexandre was to advance his exercise band to green and add more exercises, and indicating a follow-up in two weeks. (Id. ¶ 34.)

On September 4, 2003, Alexandre was seen by HealthSouth. The records reflect that he was provided with new exercises that could be performed in his cell and that he would be seen again in one week. (Id. ¶ 35.) On September 12, 2003, Alexandre was seen again by HealthSouth. The physical therapist's notes requested a call from the jail as the physical therapist wanted to see Alexandre three more times, indicated that they had started new treatment to help Alexandre deal with his pain and suggested that Alexandre should continue on with his exercises. (Id. ¶ 36.)

On September 15, 2003, Alexandre submitted a medical request in which he asked to see a physician assistant regarding his pain medications. (Id. ¶ 37.) On September 16, 2003, Alexandre was seen by HealthSouth for physical therapy. The physical therapist noted good compliance with his exercise and treatment, added some new exercises, and advised Alexandre to continue with his home exercise program. (Id. ¶ 38.) On September 22, 2003, Alexandre was seen by HealthSouth for physical therapy. The physical therapist's records identify that Alexandre was to continue with his current physical therapy plan. (Id. ¶ 39.)

On October 2, 2003, Alexandre was sentenced to forty years in prison and the Penobscot County Jail turned Alexandre over to the custody of the Maine Department of Corrections on October 3, 2003. (Id. ¶ 40.)

Pursuant to Penobscot County Jail Policy Number F-310, personnel of the Penobscot County Sheriff's Department will not refuse or hinder an inmate's right to medical services or care, diagnose or treat an inmate's illness, and/or impose restrictions on the Health Clinic personnel pertaining to the practice of medicine/nursing other than regulations necessary to ensure security. (Id. ¶ 41.)

Alexandre's Response to the Motions for Summary Judgment

In his omnibus response to the three motions for summary judgment (Docket No. 41), Alexandre states in a conclusory fashion that the defendants have filed untrue statements in their motion for summary judgment and in their affidavits. As they pertain to Ross's motion these unsworn counterpoints are as follows.

With respect to the assertion that Alexandre has suffered many injuries to his right shoulder due to working as a logger, Alexandre responds that he never suffered any

injuries to his shoulder while working as a logger, although he did injure his shoulder when he was a child when he fell off his bike and broke his collar bone. This childhood injury was the only injury of his shoulder prior to the slip and fall at the jail.

With respect to the claim that Alexandré was seen by Patricia Griffith, M.D., on a referral from Doctor Tripathi for a follow-up visit, Alexandré claims that Coggeshall cancelled that appointment on June 9, 2003. And, while Ross claims that on June 9, 2003, Coggeshall advised the nursing staff at the jail to give Alexandré Percocet after Cichon had ordered it to be stopped, Alexandré protests that he had to beg Coggeshall for that pain reliever. There are many more inconsistencies in the defendants' motions and affidavits, Alexandré asserts in closing, without providing any more particulars.

Resolution

Based on the supported material facts presented by Ross, and left almost entirely uncontested by Alexandré, I conclude that, there being no genuine dispute as to any of the material facts, Ross is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). Ross does not contest that Alexandré was injured at the jail and experienced shoulder pain during his detention at the jail. However, it is evident that, from the material facts properly before me, the medical staff at the jail responded to Alexandré's request for care with prompt evaluations, prescriptions, and outside medical evaluations and services. Alexandré articulated his discontent with some of the medical choices made at the jail at the time and the medical staff responded, although not always in a manner to his liking.

Even if I could credit the unsworn assertions by Alexandré that he did not injury his shoulder logging, this does not change the landscape of the dispute. This is because

the root cause of the shoulder injury is not material in light of the other undisputed material facts. This is not a case about whether or not the jail had an obligation to treat the shoulder injury. The undisputed facts demonstrate a persistent effort to diagnose the shoulder problem and to treat it with medication and physical therapy. And, Ross does not dispute that Coggeshall canceled the follow-up visit with Doctor Griffith; what is important (and undisputed) is that this visit was cancelled because of the note penned by Griffith recommending a hiatus in orthopedic treatment until Alexandre's "social situation" was settled. Vis-à-vis the temporary lull in the prescription of Percocet, the undisputed fact is that the prescription was initially ordered for four days ending June 6, 2003, that it was not renewed during a June 7 visit to the medical department per Cichon's order, but that Coggeshall did order the prescription on June 9, 2003. Even if this renewal was only after Alexandre's begging, such a scenario does not, standing alone, amount to a deliberate indifference claim.

Perhaps something more or different could have been done for Alexandre's shoulder condition,⁴ but even if Alexandre had established a factual basis for concluding that Coggeshall or Cichon made a mistake in judgment in treating his shoulder, this would not form a factual basis for concluding that this was deliberately within the meaning of Farmer. Giving Alexandre the benefit of all reasonable inferences, Alexandre has not generated a genuine dispute of material fact to form the bases for a conclusion that the medical staff acted with a culpable state of mind. Farmer, 511 U.S. at 834. Cichon's and Coggeshall's course of treatment amounts, at the most, to no more than negligence, see Daniels, 474 U.S. at 335-36; Estelle, 429 U.S. at 105-06. Without an

⁴ Not surprisingly as a pro se incarcerated litigant, Alexandre has provided no record evidence in the nature of a professional medical opinion that the course of treatment afforded him was inadequate or misguided.

underlying constitutional violation Ross cannot be held liable individually on a supervisory theory or in his official capacity on a policy and custom theory. See Wilson v. Town of Mendon, 294 F.3d 1, 6 -7(1st Cir. 2002); see also Bowman v. Corrections Corp. of America, 350 F.3d 537, 544-47, (6th Cir. 2003).

Conclusion

For the reasons stated above I recommend that the Court **GRANT** Ross's motion for summary judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

May 6, 2004.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

ALEXANDRE v. CICHON et al
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK
Demand: \$
Lead Docket: None
Related Cases: None
Case in other court: None

Date Filed: 08/07/03
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Cause: 42:1983 Prisoner Civil Rights

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